United States Court of Appeals for the Second Circuit



APPELLANT'S REPLY BRIEF

URIGINAL

77-1064

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

against

JOHN McGRATH,

Appellant.

APPELLANT'S REPLY BRIEF

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Addendum

Defendant's Exhibit D

Defendant's Exhibit AJ

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

Docket No. 77-1064

JOHN McGRATH

Appellant.

APPELLANT'S REPLY BRIEF

STATEMENT

The defendant did not base this appeal on the factual issues of the case. Nevertheless, the Government, in its brief, has chosen to utilize fifteen pages to set forth what it describes as a "Statement of Facts". The Government, in the introduction to its brief, without citation to the record or authority, states the following:

"The Long Island State Park Commission oversees the operations and approves policies and programs for the Long Island State parks, parkways, boats, boat channels and Jones Beach" (Brief of Appellee, p. 2).

The Long Island State Park Commission, as a matter of law, ceased to operate in September 1972. At no time did it

have jurisdiction over Jones Beach, as stated. This was relegated to the Jones Beach State Parkway Authority by statute.

The Government brief (p. 3) wildly asserts:

"The evidence adduced at trial made clear that appellant McGrath was the central figure in a pattern of political corruption which pervaded the process by which towing contracts were obtained. McGrath, almost without exception, was the public official directly involved in the approval of these contracts, and it was his personal responsibility to handle all administrative matters relative to the towing operators."

Except for pretrial media publicity, there is not a spectre of evidence that there was political corruption surrounding the towing contracts, nor was there any evidence that McGrath was directly involved in the approval of towing contracts. Nor does the Government cite to any portion of the record to support its assertion. Moreover, there was no showing that he was the person responsible for handling all administrative matters relative to the towing operators. Indeed, the testimony of Mr. Champ, the executive officer (1876) of the Long Island State Park Commission at the relevant times, was that the Commission at no time ever made a contract with a tower, but only made contracts with the oil

companies who, in turn, engaged the towers; e.g. cf. Deft.
Exs. "D" and "AJ" in evidence* (1849-1860, 1876, 1879).

The testimony of Ancona and LaGuardia are detailed at length in the Government's "Statement of Facts". It is urged that the jury, in acquitting the defendant of the counts involving Ancona and LaGuardia, demonstrated its disbelief of their testimony. Its insertion into the Government's argument is inappropriate. Furthermore, by citing out of context the Government is attempting to create an atmosphere hostile to defendant. For instance, it stated that: "Ancona advised Ravasio tha' McGrath wanted \$5,000 from Ravasio for Ravasio to assume Gull's section of the parkway (165)" (Govt. Brief, p. 6). Ancona's convenient statement was unsubstantiated, as the prosecution did not call Ravasio. It was disproved by the testimony of Mr. Champ (1873-1875), who stated that it was he (Mr. Champ) who recommended Ravasio to the fuel company. Nevertheless, immediately following the quote above, the Government states: "Thereafter, in May 1973, Ravasio obtained a parkway towing franchise (172)". The franchise was, of course, from the oil company who had a contract to do so with the Long Island State Parks Commission. Thus, by adding the fact that

^{*}Copies of exhibits are attached as addenda to this Brief.

Ravasio thereafter obtained a towing franchise created an inference which is contrary to fact and contrary to the proof. We urge that the Government's "Statement of Facts" is unfairly stated and is an attempt to divert the Court's attention from the serious error committed below.

sion of the Government's Point I, viz., the so-called "amended" indictment. Defendant does so, based upon the belief that the issues with respect to the other points are clearly drawn by the main briefs. For example, the charts prepared by the Government, purportedly to assist in the testimony given by its witnesses, are either prejudicial in size, format and content, or they are not. Both sides have urged their positions, and the Court, upon visualization, will be able to make its determination.

In addition, whether Foley's hearsay statement that LaGuardia had told him that he could arrange a dinner with the defendant to "work something out", but that it would probably cost Foley \$10,000 to return to the parkway, is a prior statement consistent with LaGuardia's direct testimony that he gave McGrath money, is something which this Court can determine without reiteration or further argument.

Further, the Government's cat and mouse game with respect to the testimony of Randolph W. Taylor, Jr., the Government's only corroborating eye witness, is likewise clearly argued by the main briefs. Parenthetically, it should be noted that the Government gives no explanation for its duplicity. It does not deny that at the time it furnished the list of witnesses to defendant, stating that the address of Randolph W. Taylor was unknown, the Government knew Taylor's whereabouts and address.

THE "AMENDED" INDICTMENT

The Government's brief misstates the defendant's argument. It was not defendant's contention that during 1969 to September 1972 the Long Island State Parks and Recreation Commission was called the Long Island State Park Commission. It was the defendant's argument below, and on this appeal, that there were two separate governmental bodies, one of which existed prior to September 1972, and another of which came into being in September 1972. It was this latter body, the Long Island State Parks and Recreation Commission to which the original indictment refers; that the Grand Jury found to be the governmental body which employed

the defendant; that such body had authority over the "Park-ways"; supervised towing operations on the Parkways, and "accordingly, John McGrath, the defendant, had the power * * *" (Indictment, Counts 11-15). The amendment did not, as the Government urges, merely delete the words, "and Recreation", from the indictment. It made substantial changes by adding and naming a new governmental authority. The Grand Jury, in its post-jeopardy amendment, after reiterating the language of the original indictment, added as follows:

"(2.) The September, 1975 Special Grand Jury, which returned the aforesaid indictment, hereby amends and authorizes the United States District Court to amend all references to the 'Long Island State Parks and Recreation Commission' to read as follows:

'Long Island State Park Commission prior to approximately September, 1972 and the Long Island State Park and Recreation Commission subsequent to approximately September, 1972.'" (App. 35a)

The Government argues that the new indictment was proper because it was done by the Grand Jury. The Government did not address itself to the proposition as to whether an indictment may be amended during the trial and after jeopardy attaches.

Ex parte Bain dealt with an amendment to an indictment before trial, not during trial. There, the lower court permitted the words, "comptroller of currency and", to be deleted by the prosecution as mere surplusage, and required the defendant to plead to the indictment as it then read. The Supreme Court of the United States held that such a deletion was an amendment and, therefore, unlawful. It is submitted that an amendment to an indictment may only be made by the Grand Jury before trial and then becomes a superseding indictment. It is only in that way that an accused has an opportunity to test the validity of the indictment prior to trial, make proper pretrial motions, prepare his trial strategy, and/or change a plea.

The language of the indictment pervaded the entire trial from opening to closing. A mere reading of the opening statement by the prosecution in the case at bar shows that defendant, from the outset, was objecting to the prosecution's use of the nomenclature, Long Island State Park Commission, Parks Commission, and Long Island State Parks and Recreation Commission, interchangeably, and insisted upon a strict adherence by the prosecutor to the governmental body charged in the indictment as the genesis of the defendant's power (10-13).

In effect, the Government argues that the indictment was amended in accordance with Bain and, therefore, proper. But to argue thus, without considering the concommitant constitutional problem raised by amendment during trial is to miss the very thrust of defendant's contention. What is an amended indictment, as opposed to a superseding indictment? Did this defendant have an opportunity to be arraigned on this "amended" indictment? Did he have an opportunity to change his plea? Did he have an opportunity to challenge the legality of the "amended" indictment" And, finally, did the defendant have proper notice in order to prepare himself to meet the allegations of the new indictment? The Government's answer is that it really didn't matter since the amendment was "innocuous, cosmetic and immaterial" (Govt. Brief p. 20). The Trial Court did not feel that it was innocuous, cosmetic and immaterial (52). Obviously, the prosecution did not think it was innocuous, cosmetic and immaterial, since it sought to reconvene, on hours' notice, a prior Grand Jury to procure an "amended" indictment. Furthermore, the Grand Jury and the prosecutor, together, did not think that it was innocuous, cosmetic and immaterial, for the prosecution submitted further testimony to the Grand Jury and

the Grand Jury considered this testimony before issuing the so-called "amended" indictment. We respectfully urge that this "amended" indictment is a superseding indictment in every sense of the word.

Although, to this date, the defendant does not know what explanation was given by the prosecution to this hastily reconvened Grand Jury to explain their presence, we respectfully request this Honorable Court to review those Grand Jury minutes to see just what position was taken and what possible improprieties may have occurred.

The Government analogizes Rule 7(e) which permits a prosecutor to amend an information at any time before final verdict with an attempt to "amend" an indictment. It is again respectfully pointed out to this Court that only upon defendant's consent and on defendant's motion may "surplusage" in an indictment be removed (FRCP Rule 7(d)). Moreover, in Ex parte Bain, the Court rules that surplusage or not, the indictment is not to be altered except in accordance with law. Rule 7 is entitled, "THE INDICTMENT AND THE INFORMATION". Subdivision (e) of the Rule permits an amendment of an information at any time before verdict or finding, if no additional or different offense is charged. No reference is

contained in Rule 7 which would permit the amendment of an indictment at any time. Under the rule of <u>ejusdem generis</u>, the fact that an amendment of an information is permitted by this Rule which refers generically to "indictments" and "information", creates the logical conclusion that an amendment to an indictment is not permitted.

Nowhere does the Government cite this Court to any authority permitting a Trial Court to accept an amendment to an indictment by a Grand Jury after a trial has started.

It is submitted that the defendant's motion to dismiss the indictment was timely made. Ex parte Bain holds that such motion is jurisdictional in character in that although the Court retains jurisdiction of the person and would have jurisdiction of the crime if it were properly presented by the indictment, the jurisdiction of the offense is gone.

The Government's brief states: "Moreover, no compelling reason was proffered why he had not requested a bill of particulars on this issue" (Govt. Brief, p. 22). As a matter of fact, the defendant McGrath had moved, by pretrial motion, for a bill of particulars on this very issue. The relevant portion of the motion for a bill of particulars requested that the Government state: (Docket Entry 5/19/76)

- "6. With respect to Counts Eleven through Fifteen, both inclusive, set forth the following:
- (c) The manner in which it will be claimed that each named tow truck operator was subject to the authority, direction, supervision and control of the governmental authority alleged in the Indictment."

The Government opposed the motion, and the Court sustained the Government's position, thus denying to defendant this vital information.

The "prosecutor" has a penchant for quoting himself and then "clip-quoting" a case to sustain his quote. He charges the defendant with attempting to "'sandbag'" the prosecution, and refers to "'sanctioning the playing of games' by a defendant", citing the inapposite <u>United States</u> v. <u>Saltzman</u>, 548 F.2d 395 (2d Cir. 1976) (Govt. Brief, p. 22). Defendant here is not in a game. His liberty and his property are at stake. It was the Government, with misplaced prosecutorial zeal, which engaged in a game. It lied when it said that the address of Randolph Taylor was unknown. Yet Taylor was the only witness to corroborate the testimony of the conspiring tow truck "victims". It opposed the defendant's request for proper particulars of the crime charged in the indictment. These are the acts of a gameplayer seeking a tactical advantage. The defendant, by law,

has a right to rely on the charges as set forth in the indictment. His constitutionally protected right should not be abridged. Once the "game" is started, and the contestants are on the field, the rules of the game are not to be thereafter changed. Patently, the rules of law hold that a man is to answer to an indictment duly presented and under which he is duly arraigned. It is under this rule that a trial is had. To change the very basis of the prosecution, once the case is underway, is to obliterate the very fundamental rules of law by which persons are prosecuted for crimes and renders a person subject to the whim of a prosecutor allowing him to reconvene a Grand Jury to meet the exigencies of his case as it progresses.

The Government treats the defendant's Point III with a footnote stating that Santo Russo testified before the Grand Jury that he was employed by Russo Brothers Service Center, Inc. (Govt. Brief, p. 26). Not mentioned by the Government was that Russo also testified before that same Grand Jury that he was employed by Russo Bros. Service Station, Inc. Thus, the Grand Jury chose to accept one portion of Russo's testimony but did not accept that portion of his testimony where he stated he was employed by Russo Brothers

Service Center, Inc. (694-696, App. 119-121).

Lastly, a close reading of the Government's brief shows no reference, explanation or defense to defendant's contention that the jury was never informed of the "amended" indictment, despite defendant's request to the Court to so charge and the exception taken upon the Court's failure to do so. Was the defendant convicted on the original indictment or on the "amended" indictment? Since the jury was unaware of the "amendment", it must follow that they convicted the defendant on the indictment as originally cast. Since the Court accepted the presentment of the "amended" indictment (App. 104), the Court must have sentenced the defendant on the amended indictment. Accordingly, the conviction on the original indictment is jurisdictionally defective because of all of the arguments made prior to the "amendment" of such indictment. It is, additionally, improper, since the original indictment was superseded by an "amended" indictment which was never considered by the jury. Finally, defendant has been sentenced on an "amended" indictment upon which he was never tried. His basic constitutional right to a jury trial has been denied.

CONCLUSION

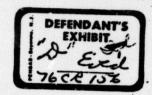
IN VIEW OF THE FOREGOING, IT IS RESPECT-FULLY SUBMITTED THAT THE JUDGMENT OF CONVICTION OF APPELLANT, JOHN MCGRATH, APPEALED FROM, SHOULD BE REVERSED AND THE INDICTMENT DISMISSED.

Respectfully submitted,

MEISELMAN, BOLAND, REILLY & PITTONI Attorneys for Appellant, John McGrath

LEONARD J. MEISELMAN JOHN J. REILLY, of Counsel.

Defendant's Exhibit D



AGREEMENT made this 13th day of January , 1965, by and between SOCONY MOBIL OIL COMPANY, INC., a New York corporation having its office and principal place of business at 150 East 42nd Street, in the Borough of Manhattan, City, County and State of New York, hereinafter called Firt Party, and CHARLIE'S AUTO CENTER, INC., a New York corporation, having its principal place of business at 2288 Jerusalem Avenue, No. Bellmore, County of Nassau and State of New York, hereinafter called Second Party.

WITNESSETH:

WHEREAS, the First Party and the Long Island State Park Commission and the Jones Beach State Parkway Authority have here-tofore entered into a Licensing Agreement bearing date of December 2, 1964 wherein the First Party has agreed to supply an emergency service for emergency gasoling oil, repair and towing in the parks and on the parkways under the jurisdiction of the aforesaid commission and authority; and

WHEREAS, Second Party desires to operate and maintain said emergency service; and

WHEREAS, First Party is willing to grant such privilege on the terms and conditions as hereinafter more fully set forth.

NOW, THEREFORE, in consideration of the premises and of the sum of One Dollar (\$1.00) and other good and valuable considerations by each of the parties to the other in hand paid, receipt whereof is hereby acknowledged, the parties hereto hereby agree as follows:

- 1. Second Party shall supply at Second Party's sole cost and expense an emergency service for emergency gasoline, oil, repair and towing service. Such service shall be provided from January 1, 1965 to December 31, 1967 within the following areas:
 - (1) From first bridge south of Merrick Road on Meadowbrook or Wantagh Parkways; (2) All of Jones Beach area west of the easterly boundary of Parking Field #9, including Short Beach, the Loop Parkway and the Meadowbrook and Wantagh Parkways south of the first bridge south of Merrick Road; (3) Area between the easterly boundary of Parking Field #9 and Gilgo Pavilion; (4) Southern State Parkway beginning at Nassau Road and extending east to Wantagh Parkway bridge and to include the exits and entrances on the west side of Wantagh Parkway Bridge; to extend east of Wantagh Parkway Bridge on Southern State Parkway to Route 110 including Bethpage Parkway.
- 2. The type, size and color of the equipment used for this service and the type, size, color and placement thereon of all lettering shall be approved by the Long Island State Park Commission and the Jones Beach State Parkway Authority and the First Party before being put into service. The emergency equipment shall be in service at all times and maintained in good condition. No major repairs shall be done. Towing, repairs and service shall be charged at the prices as hereinafter cited. Such prices must be approved by the Jones Beach State Parkway Authority the Long Island State Park Commission and First Party, and such prices shall be posted in the cab of the towing truck. The vehicles to be used by Second Party in the performance of this emer-

gency service shall be limited to the following:

Type		Serial No.	License Plate No.
1963 Ford		F35JE432609	227629 -
1964 Ford		F809V542734	225414
1961 Ford		F34JE132154	227631
1964 Ford		F35JE450576	227634
1964 Ford		F35JE450577	227633
1960 Ford		F35J039410	227628
1963 Ford		F35JE432609	227627
1957 Dodge		T137104204	227632
1949 Dodge		T14845200	225415
1905 Fed 9 111	(4WD)	F26 BE6 25026	722625

In addition, two 1965 Ford F250, 4 Wheel Drive Vehicles are on order and will be delivered during the first week of January, 1965. No serial numbers are presently available for said vehicles.

3. Towing repairs and service shall be charged at prices approved by the Long Island State Park Commission, the Jones Beach State Parkway Authority and by First Party and such prices shall be posted on the exterior of the cab of Second Party's towing truck(s). The rates to be charged therefor and which shall be displayed as aforesai shall be as follows:

		Rates		
•	Tow, Lift or Pushing	Tow or Push	Lift & Tow	
		to Nearest Exit	to Nearest Exit	
(a)	From first bridge south of Merrick Road on Meadowbrook	\$3.50	\$5.00	
•	or Wantagh Parkways.			
(b)	All of Jones Beach area wes of the easterly boundary of Parking Field #9, including Short Beach, the Loop Parkwand the Meadowbrook and Wan	av		
	Parkways south of the first bridge south of Merrick Roa		7.00	
(c)	Area between the easterly boundary of Parking Field # and Gilgo Pavilion.	9 8.00	10.00	
(a)	Southern State Parkway beginning at Nassau Road and	d 3.50	5 00	
<i></i>	/extending east to Wantagh Parkway bridge and to incluthe exits and entrances on west side of Wantagh Parkway Bridge; to extend east of Wantagh Parkway Bridge on South State Parkway to Route 110 cluding Bethpage Parkway.	de the y an- hern	5.00	
(e)	Cars stuck in sand.			
	1. Up to 75 ft. 2. 75 ft. to 200 ft. 3. Over 200 ft.	5.00 8.00 10.00		
(f)	The entire section of the Wantu and Meadowbrook Parkways.	gh Same As Subspacepolis	Some As	

(Fi) asive

-2-

W

	Other Services	Rates
(a) - Gasoline delivery service (plus cost of gasoline at current price).	\$1.50
(b) - Removing flat tire and mounting spare.	2.50
) - Removing flat tire, repairing and mounting.	3.00
1.) - Roadside emergency repairs, per hour.	3.00
(e) - Straight tow or push to nearest exit.	3.50
(f) - Lift and tow to nearest exit.	5.00
(g)) - Towing from exit to operator's garage or other destination per mile or fraction thereof.	1.00
(h)	- Separating interlocking bumpers.	2.00
•	- Removing or installing skid chains.	2.50
	- Storage inside per day.	1.50
i	- Storage outside per day.	.50
	- Cars stuck in sand.	
	 Up to 75 ft. 75 ft. to 200 ft. Over 200 ft. 	5.00 8.00 10.00

4. This emergency service shall L conducted in a careful and orderly manner so that no traffic hazard shall be created and Second Party shall render prompt and courteous service. All waste material including broken glass, loose parts, etc., shall be removed by the Second Party at the time and place where any work is performed.

comply with the provisions of the Workmen's Compensation Act of the State of New York; Second Party shall also provide, at its own sole cost and expense, public liability insurance and/or garage liability insurance containing inside and outside coverage, to protect itself, the Long Island State Park Commission, the Jones Beach State Parkway Authority, the People of the State of New York and First Party, from any and all claims for loss, damage or injury to persons (including death), or to property of whatsoever kind of nature, which may arise out of or in connection with the operation of the emergency service furnished by Second Party on the aforesaid parkways in the amount of One Hundred Thousand Dollars (\$100,000.00) for one person and Five Hundred Thousand Dollars (\$500,000.00) for more than one person injured or killed in any one accident, and shall provide against loss or damage to property in an amount not less than Fifty Thousand Dollars (\$50,000.00). Each policy shall have endorsed thereon "No cancellation of or change in this policy shall become effective until after ten (10) days notice by registered mail addressed to THE MOBIL OIL COMPANY, 50 West 44th Street, New York City, New York," and shall be delivered in satisfactory form to said Company with

full premiums paid and so marked thereon, before the commencement of any operation of this License Agreement.

6. Second Party, at its own sole cost and expense, shall comply with all laws, and ordinances, and every notice, requirement, order, regulation and recommendation (whatever the nature thereof may be) of any and all the Federal, State, County, Municipal and/or other authorities, and of the Board of Fire Underwriters and of the Long Island State Park Commission and of the Jones Beach State Parkway Authority, and any insurance organizations or associations and/or companies with respect to this License.

3. t.

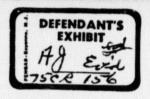
- 7. Second Party assumes all risk in the operation of this license and shall be solely responsible and answerable in damages for all accidents and injuries to person or property and hereby covenants and agrees to indemnify and hold harmless the Long Island State Park Commission, the Jones Beach State Parkway Authority and the People of the State of New York and/or the First Party from the violation of any law, ordinance, rule or regulation affecting or relating to the operation under this license and from any and all claims, suits, losses, damage or injury to person or property of whatsoever kind or nature, whether direct or indirect, arising out of the operations under this license or the carelessness, negligence or improper conduct of the Second Party or any servant, agent or employee and to reimburse the Long Island State Park Commission, the Jones Beach State Parkway Authority and/or the First Party for all expenses, costs and judgments arising there-
 - 8. The Second Party shall not sell, mortgage or parcel out the license hereby granted or any interest therein, or consent, allow or permit any other person or party to perate and maintain this emergency service, nor shall this license be transferred by operation of law, it being the purpose and spirit of this instrument to grant this license and privilege solely to the Second Party as herein named.
 - 9. Any and all notices by First Party to Second Party shall be in writing and any such notice may be given and shall be deemed to have been duly and sufficiently given if either delivered personally or mailed in any United States general or branch post office, enclosed in a registered postpaid envelope addressed to Second Party, 2283 Jerusalem Avenue, No. Bellmore, New York.
 - 10. In the event that Second Party shall fail to comply with any of the provisions contained in this agreement or render this emergency service in such a manner as shall be unsatisfactory to the Long Island State Park Commission, the Jones Beach State Parkway Authority or the First Party, this license shall be subject to cancellation by the First Party upon not less than twenty-four (24) hours written notice.
 - ll. This license is subject and subordinate to the aforesaid Licensing Agreement, dated December 2nd, 1964, from the Long Island State Park Commission and the Jones Beach State Parkway Authority to the First Party, and the Second Party agrees to comply with all the terms, covenants and conditions of said Agreement, to be performed on the part of First Party with respect to said emergency service for repair and towing in the aforesaid areas and recognizes the fact that by accepting this license, Second Party herein receives no greater rights with respect thereto than those which First Party received by virtue of the said agreement

dated December 2nd, 1964. In the event t the underlying license is terminated for any reason whatsoever before the expiration of this license, this license shall terminate simultaneously therewith to the extent that said underlying license is terminated.

12. In the event this license is terminated for any reason whatsoever, all rights of the Second Party herein shall be forfeited without any claim for damages against the Long Island State Park Commission, the Jones Beach State Parkway Authority, the People of the State of New York, or the First Party.

IN WITNESS WHEREOF, the parties hereto have executed this agreement the day and year first above written.

ATTEST:	SOCONY MOBIL OIL COMPANY, IX
	By:
ATTEST:	CHARLIES AUTO CENTER, INC.
	By Charles Ancara



AGREEMENT made this 1/2 day of January, 1970, between the LONG ISLAND STATE PARK COMMISSION, with office at Belmont Lake State Park, Babylon, Suffolk County, New York, acting for and on behalf of the People of the State of New York, hereinafter called the "COMMISSION"; the JONES BEACH STATE PARKWAY AUTHORITY, with office at Belmont Lake State Park, Babylon, Suffolk County, New York, a public benefit corporation created by Chapter 70 of the Laws of 1933, as amended, hereinafter called the "AUTHORITY"; and HUMBLE OIL & REFINING COMPANY, a Delaware corporation, having an office and place of business at Hutchinson River Parkway, Pelham, Westchester County, New York, hereinafter called the "LICENSEE".

WITNESSETH

WHEREAS, the COMMISSION is charged by law with the management and control of State parks and parkways in the Counties of Nassau and Suffolk, with the exception of the Wantagh Causeway and Meadowbrook Causeway, the Southern State Parkway from a connection with the Belt Parkway to Wantagh Avenue within the County of Nassau and the Meadowbrook State Parkway Extension, which Causeways and Parkways are under the management and control of the Jones Beach State Parkway Authority, and

WHEREAS, the COMMISSION, the AUTHORITY and the LICENSEE have heretofore entered into an agreement, identified as Comptroller's Contract No. 409-9, dated the 18th day of November, 1964, amended as of the 7th day of December, 1967 and further amended as of the 29th day of May, 1968 and the 12th day of December, 1969, for the operation of service stations designated as Group "A" under the aforesaid contract, for the sale of gasoline, oil, automobile supplies, tire repair service, and for the providing of emergency towing and repair service along the parkways within the Group "A" emergency service areas and within the parks adjacent thereto and such other services and supplies approved by the COMMISSION or AUTHORITY, for a term ending on the 31st day of

WHEREAS, the COMMISSION, the AUTHORITY and the LICENSEE wish to further amend the said Contract No. 409-9 to extend the term of the said license for an additional period ending on the 31st day of January 1, 1975 and to provide for an increase in the consideration to be paid by the LICENSEE to the COMMISSION and to the AUTHORITY, and

WHEREAS, Section 19 of said Contract No. 409-9 provides that the license may be modified or extended by agreement in writing duly executed by the parties hereto and approved by the Attorney General and Comptroller of the State of New York.

NOW, THEREFORE, in consideration of the premises and the mutual covenants and conditions herein contained, it is agreed by the parties hereto as follows:

1. The second paragraph, as amended, of Section 1 of said Contract No. 409-9 shall and the same is hereby further amended to read as follows:

"The above stations shall be operated by the LICENSEE for a term beginning on the 1st day of January, 1965, and ending on the 31st day of January, 1975 for the sale of gasoline, oil, automobile supplies and such other services or supplies as may be approved by the COMMISSION or AUTHORITY, all subject to the terms and conditions as herein set forth."

- 2. The first paragraph, as amended, of Section 7 of said Contract No. 409-9 shall and the same is hereby further amended to read as follows, effective February 1, 1970:
- "7. Commencing on February 1,1970 the LICENSEE agrees to pay to the COMMISSION or AUTHORITY, as applicable, the sums of thirty-five cents (\$.35) for each gallon of oil and seven and three-tenths cents (\$.073) for each gallon of gasoline delivered annually to the stations designated as Group 'A'."

IT IS UNDERSTOOD AND AGREED that except as provided herein, said Contract No. 409-9, dated the 18th day of November, 1964, and amended as herein indicated, shall remain in full force and effect.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be signed and sealed the day and year first above written.

LONG ISLAND STATE PARK COMMISSION

	By S/ S; M. SHATIRO		
Attest:	General Manager SEAL		
5/ Frank Champ			
7	JONES BEACH STATE PARKWAY AUTHORITY		
	By S/ S. M. SHAPIRO General Manager		
	General Manager		
Attest;	SEAL		
5/ Trank Champ			
7			
•			
	HUMBLE OIL & REFINING COMPANY		
	By of S. Charlton Vice Free.		
Attest:	Vice Free.		
S/C. R. Buninser			
SEAL des t. Sabretary			
Approved as to form	19 Approved19		
Attorney General	For the State Comptrolle		

STATE OF NEW YORK)

: SS.:
COUNTY OF SUFFOLK)

On this 19 May of January, 1970, before me personally came S. M. SHAPIRO, to me known, who being by me duly sworn did depose and say, that he resides at No Number, No Street, Belmont Lake State Park, Town of Babylon, County of Suffolk, State of New York, that he is the General Manager of the Long Island State Park Commission, the Commission described in and which executed the foregoing instrument; that he knows the seal of said Commission, that the seal affixed to said instrument is such official seal, and that it was so affixed by order of the said Commission and that he signed his name thereto by like order.

Notary Public
Richard C. French
Notary Public, State of New York
No. 52-6402549
Qualified In Suffolk County
Commission Expires March 30, 1970

STATE OF NEW YORK)
: SS.:
COUNTY OF SUFFOLK)

On this 19 thday of January, 1970, before me personally came S. M. SHAPIRO, to me known, who being by me duly sworn did depose and say, that he resides at No Number, No Street, Belmont Lake State Park, Town of Babylon, County of Suffolk, State of New York, that he is the General Manager of the Jones Beach State Parkway Authority, the Authority described in and which executed the foregoing instrument; that he knows the seal of said Authority, that the seal affixed to said instrument is such official seal, and that it was so affixed by order of the said Authority and that he signed his name thereto by like order.

Notary Public
Richard C. French
Notary Public, State of New York
No. 52-6402549
Qualified in Suffolk County
Commission Expires March 30, 1970

STATE OF NEW YORK) : SS.: COUNTY OF WESTCHESTER)

On this /6 it day of January , 1970, before me

personally came S. E. Charlton , to me know, who being by

me duly sworn, did depose and say that he resides at 178 Christie Hill Rd.,

Darien, Conn. and that he is a VICE PRESIDENT of the

Humble Oil & Refining Company, the corporation described in and which

executed the foregoing instrument; that he knows the seal of said

corporation; that the seal affixed to said instrument is such corporate

seal; that it was so affixed by order of the Board of Directors of

said corporation, and that he signed his name thereto by like order.

Notary Public

Sondra R, Cohen

Notary Public, State of New York

No. 30-5747912

Qualified in Nassau County

Cert. filed with Westchester Co. Clk.

Commission Expires March 30, 1970

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

against

JOHN McGRATH, Appellant.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK, COUNTY OF

, 88:

Kenneth P. Riccardi

14.

being duly sworn, years and resides at 2821 W 12th St Bklyn

deposes and says that he is over the age of 21

1977 at 225 Cadman Pl. E. Bklyn

That on the 9th day of May

upon

he served the annexed APPELLANTS REPLY BRIEF

David G. Trager U.S. Attorney in this action, by delivering to and leaving with said

true cop iesthereof.

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the person mentioned and described in the said

Deponent is not a party to the action.

Sworn to before me, this ____9th

day of _______19_77_

Henneth J. Diccardi

ROLAND W. JOHNSON Notary Public, State of New York No. 4509705

No. 4509705

Qualified in Delaware County

Commission Expires March 30, 19